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EXAMINER

FLOOD, MICHELE C

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1654

10

DATE MAILED: 08/22/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
09/942,107

Applicant(s)
Ahn et al.

Examiner
Michele Flood

Art Unit
1654



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Jul 11, 2003
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☒ The proposed drawing correction filed on Aug 28, 2001 is: a) ☒ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

- 14) ☒ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 7 6) ☐ Other:

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DETAILED ACTION

Acknowledgment is made of the receipt and entry of the amendments filed on July 11, 2003, and newly added Claims 11-20.

Election/Restriction

1. Applicant's election without traverse of the species: the second group consisting of each crude extract from *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia*, mustard (*Brassica juncea*) and horseradish (*Cholearia aroracia*) in Paper No. 9 is acknowledged.

The Office notes that Applicant has not fully responded to the election of the species requirement by including a listing of all claims readable thereon, and including any claims subsequently added. In an attempt to have Applicant fully respond to the election requirement, a telephone call was made to Amit Sheth on August 14, 2003, however the telephone call did not result in establishing the status of the claims readable on the elected species. However, in an effort to expedite prosecution of the present application, the Office identifies Claims 1-3, 11, 12, 16, 17 and 20 as readable on the elected invention, taking the following into consideration:

The Office notes that Applicant has elected the species of the second group consisting of each crude extract from *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia*, mustard (*Brassica juncea*) and horseradish (*Cholearia aroracia*) for prosecution on the merits. With regard to Claims 13-15, 18 and 19, as drafted, the recitation of further extracting the crude

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methanolic extracts of the claim-designated plants with additional organic solvents, *e.g.*, hexane, chloroform or hexane-ethyl acetate, renders the scope of the claimed invention outside the limitations of the elected invention of the second group because the resultant extracts would no longer be considered as crude plant extracts, since Applicant's definition of a crude plant extract is a methanolic plant extract. Furthermore, as drafted, newly submitted Claims 13-15, 18 and 19 read on the plant extracts of the third and fourth groups, as set forth in Claim 1.

Claims 1-20 are under examination.

The claims have been examined, insofar, as they read on the elected invention, namely "the second group consisting of each crude extract from *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia*, mustard (*Brassica juncea*) and horseradish (*Cholearia aroracia*)".

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 1-10, 13, 15, 17, 19 and 20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

As drafted, Claim 1, in its entirety is rendered vague and indefinite because it is unclear as to the subject matter Applicant intends to direct the invention. While Applicant claims "An insecticide comprising at least one selected from a first group consisting or second, third and

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fourth groups, the second group consisting of each crude extract from *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia*, mustard (*Brassica juncea*) and horseradish (*Cholearia aroracia*), the third group consisting of extracts obtained from each crude extract of *C. cassia*, cinnamon, mustard and horseradish of the second group and the fourth group consisting of derivatives of the third group”, it is uncertain as to whether the claimed insecticide of the second group comprises a crude extract from all of the claim-designated plants or whether the claimed insecticide of the second group comprises only one crude extract from each of the claim-designated plants. Accordingly, it is also uncertain as to the ingredients of the claimed insecticides of the third and fourth groups. The lack of clarity renders the claim very awkward and confusing.

Claim 1, line 5, is rendered vague and indefinite by the simultaneous recitation of the terms “*C. cassia*” and “cinnamon”, since both *C. cassia* and cinnamon refer to a species of *Cinnamomum*. Thus, it is uncertain as to how one term distinguishes itself from the other. The lack of clarity renders the claim ambiguous.

Claims 1, 6, 8, 10, 15, 17, 19 and 20 recite the limitation “derivative”. One of ordinary skill in the art would not know how to interpret the metes and bounds of this limitation. A derivation of a chemical compound may be closely patterned after the subject chemical compound or may be loosely patterned after the subject chemical compound, such that it may bear no resemblance or form recognizable as the subject chemical compound which maybe chemically and/or biologically unrelated in function or form to the subject chemical compound.

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Claim 9 recites the limitation "said extracts" in line 1. There is insufficient antecedent basis for this limitation in the claim.

Although not rising to the level of uncertainty, Claim 12 is rendered not grammatically correct by the phrase "wherein the crude extract from *P. suffruticosa*, *C. officinale* and *C. cassia* is methanol extract" because the phrase lacks an article before "methanol". Applicant may overcome the rejection by adding a before "methanol".

The metes and bounds of Claim 13 are rendered uncertain because the sentence lacks a period; therefore, it is uncertain as to whether Applicant intends to direct the invention to further undisclosed limitations.

All other cited claims depend directly or indirectly from rejected claims and are, therefore, also, rejected under U.S.C. 112, second paragraph for the reasons set forth above.

Specification/Abstract

4. Applicant is reminded of the proper language and format for an abstract of the disclosure.

The abstract should be in narrative form and generally limited to a single paragraph on a separate sheet within the range of 50 to 150 words. It is important that the abstract not exceed 150 words in length since the space provided for the abstract on the computer tape used by the printer is limited. The form and legal phraseology often used in patent claims, such as "means" and "said," should be avoided. The abstract should describe the disclosure sufficiently to assist readers in deciding whether there is a need for consulting the full patent text for details.

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The language should be clear and concise and should not repeat information given in the title. It should avoid using phrases which can be implied, such as, "The disclosure concerns," "The disclosure defined by this invention," "The disclosure describes," etc. In the instant case, the phrases "The present invention relates to" and "the present invention provides" should be avoided.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

~~The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999~~
(AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

6. Claims 1 and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by Seto (N), Morita et al. (O), JP 75006637 (P), Kiuchi et al. (U) and Suzuki et al. (V, Abstract).

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Applicant claims an insecticide comprising at least one selected from a first group consisting of second, third and fourth groups, the second group consisting of each crude extract from *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia*, mustard (*Brassica juncea*) and horseradish (*Cholearia aroracia*), the third group consisting of extracts obtained from each crude extract of *C. cassia*, cinnamon, mustard and horseradish of the second group and the fourth group consisting of derivatives of the third group.

Seto teaches an attracting feed poison for cockroach having improved insecticidal effect comprising an extract of SENKYU (rhizome of *Cnidium officinale*) known as a Chinese drug and containing an insecticide such as trichlorfon and boric acid. The objective attractant feed poison for cockroach is produced by adding trichlorfon or boric acid to a feed, and adding SENKYU powder to the obtained feed poison. The addition of SENKYU powder to the food poison can be carried out by kneading the above three components with water in the form of paste, or forming and drying the mixture to granular form. As an alternative method, SENKYU powder is scattered to the granular feed poison composed of a mixture of a feed and an insecticide. The insecticide also contains a powder or extract of *Cinnamomum cassia* Blume or *Wallotus philippinensis*, as an active ingredient.

Morita teaches an insecticide comprising an extract or dry powder of *Cinnamomum cassia* Blume. In an example, *Cinnamomum cassia* Blume (50g) and kaolin (39g) were powdered, and PVA powder (3g), sodium dodecyl benzenesulphonate (3.2g) and silicic acid anhydride powder (4.8g) were added and blended to obtain a 50% wettable powder.

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JP 75006637 teaches a composition comprising *Cnidium officinale* essential oil as an active ingredient, and if necessary insecticide and turpentine oil. The essential oil can be obtained by extraction with hot water, steam distillation or extraction with an organic solvent of the dried root of *Cnidium officinale*. The resulting essential oil is mixed with emulsified insecticide in the presence of a suitable emulsifier. Then turpentine oil is added at 30-50 degrees C and the resulting mixture is applied to whole pine trees in a powder sprayer.

Kiuchi teaches a nematocidal composition comprising a methanol extract of *Cinnamomum verum*. On page 358, lines 1-6 Kiuchi teaches that the pesticidal activity of the referenced methanol extract of cinnamon is attributable to the presence of cinnamaldehyde.

Suzuki teaches a crude extract of Moutan bark (*Paeonia suffruticosa*) having larvicidal effects on *Anisakis*.

The references anticipate the claimed subject matter.

Claims 1 and 11 are rejected under 35 U.S.C. 102(a) as being anticipated by Sun (N1).

Applicant's claimed invention of Claims 1 and 11 was set forth above.

Sun teaches a paeonidin as a biofertilizer is prepared from the peony plant (*Paeonia suffruticosa*) by extracting in organic solvent, and concentrating or steaming to remove organic solvent. The referenced paeonidin has the functions of pesticide and synergistic agent for fertilizer.

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The reference anticipates the claimed subject matter.

Claims 1, 3, 11 and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Sugamoto (Q) and Lawless (W).

Applicant claimed invention of Claims 1 and 3 was set forth above. Applicant claims an insecticide comprising at least one crude extract selected from the group consisting of *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia*, cinnamon (the stem bark of *C. cassia*), mustard (*Brassica juncea*) and horseradish (*Cholearia aroracia*). Applicant further claims an insecticide according to claim 11, wherein the crude extract from cinnamon, mustard and horseradish is oil.

Sugamoto teaches an acaricide for the interior of house for exterminating house ticks containing a cinnamon- bark oil, which can be used alone as an active ingredient or mixed with a carrier and other compounding agents.

On page 112, Lawless teaches a crude extract of cinnamon oil obtained from *Cinnamomum cassia*. Under "EXTRACTION", Lawless teaches that cinnamon oil may be obtained from the bark, leaves, twigs, and stalks of the plant. Under "PRINCIPAL CONSTITUENTS", Lawless teaches that bark oil of *Cinnamomum cassia* contain cinnamic aldehyde, salicylaldehyde and methylsalicylaldehyde. It is noted that the reference does not teach that the composition can be used in the manner instantly claimed, however, the intended use of the claimed composition does not patentably distinguish the composition, *per se*, since such

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undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting. Applicant is asked to review *In re Hack*, 245 F.2d 246, 248, 114 USPQ 161, 163 (CCPA 1957). “When the claim recites using an old composition or structure and the “use” is directed to a result or property of that composition or structure, then the claim is anticipated” (MPEP 2100 pp. 2113).

The references anticipate the claimed subject matter.

Claims 1, 3, 11 and 16 are rejected under 35 U.S.C. 102(e) as being anticipated by Watanabe et al. (A).

Applicant’s claimed invention was set forth above.

Watanabe teaches a fabric protectant comprising a carrier and a plant oil, *e.g.*, horseradish (obtained from *Cochlearia aroracia*) or cinnamon oil obtained by steam distillation of cassia or cinnamon (*Cinnamomum sp.*), which is applied to fabric to control fabric-related pests. *See* Table 1, in Column 5, wherein Watanabe shows the insecticidal activity of horseradish oil and cinnamon oil against moths.

The reference anticipates the claimed subject matter.

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Claims 1, 3, 11, 11, 16 and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Mochida et al. (R, translation provided herein), Rusakova (S) and Jiang et al. (V1).

Applicant's claimed invention of Claims 1, 3, 11 and 16 was set forth above. Applicant further claims an insecticide according to claim 16, wherein the oil from mustard comprises at least one compound selected from the group consisting of allyl isothiocyanate of formula 4, butyl isothiocyanate of formula 5 and their derivatives.

Mochida teaches an insect attractant capable of efficiently exterminating pests, especially larvae of Scarabaeids by formulating allyl isothiocyanate, a plant including a mustard oil glycoside, etc., as an active ingredient. The mustard oils are preferably semidrying oil obtained by squeezing seeds of *Brassica juncea* Czern. et Coss. or pulverizing the seeds, dipping the pulverized seeds into water and carrying out a steam distillation. In [0010] of the foreign patent translation, Mochida further teaches that the referenced insecticide may comprise isothiocyanic acid butyl, *i.e.*, butyl isothiocyanate.

Rusakova teaches an acaricide comprising ally mustard oil for the prevention or arachnid infestations.

On page 504, in Table 1, Jiang teaches essential oil of *Brassica juncea* (mustard oil) comprising allyl isothiocyanate and butyl isothiocyanate. It is noted that the reference does not teach that the composition can be used in the manner instantly claimed, however, the intended use of the claimed composition does not patentably distinguish the composition, per se, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use

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must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting. Applicant is asked to review *In re Hack*, 245 F.2d 246, 248, 114 USPQ 161, 163 (CCPA 1957). “When the claim recites using an old composition or structure and the “use” is directed to a result or property of that composition or structure, then the claim is anticipated” (MPEP 2100 pp. 2113).

The references anticipate the claimed subject matter.

Claims 1, 3, 11, 11, 16 and 20 are rejected under 35 U.S.C. 102(b) as being anticipated by Lawless (W).

Applicant’s claimed invention of Claims 1, 3, 11, 11, 16, 17 was set forth above.

Applicant further claims an insecticide according to claim 16, wherein the oil from horseradish comprises at least one compound selected from the group consisting of allyl isothiocyanate of formula 4, butyl isothiocyanate of formula 5 and their derivatives.

On page 88, Lawless teaches a crude extract of horseradish oil (*Cholearia aroracia*). Under “PRINCIPAL CONSTITUENTS”, Lawless teaches that horseradish oil comprises allyl isothiocyanate. Although Lawless does not teach the referenced horseradish oil as an insecticide, the horseradish oil taught by Lawless comprises the at least one claim-designated compound, allyl isothiocyanate, claimed by Applicant. Thus, an insecticide comprising the horseradish oil taught by Lawless is inherent to the composition taught by Lawless. It is noted

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that the reference does not teach that the composition can be used in the manner instantly claimed, however, the intended use of the claimed composition does not patentably distinguish the composition, per se, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting. Applicant is asked to review *In re Hack*, 245 F.2d 246, 248, 114 USPQ 161, 163 (CCPA 1957). “When the claim recites using an old composition or structure and the “use” is directed to a result or property of that composition or structure, then the claim is anticipated” (MPEP 2100 pp. 2113).

The reference anticipates the claimed subject matter.

Claims 1, 2, 11 and 12 are rejected under 35 U.S.C. 102(a) as being anticipated by Park et al. (X) and Dinan et al. (W1).

Applicant's claimed invention of Claim 1 was set forth above. Applicant further claims an insecticide according to claim 1, wherein said crude extract from *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia* are methanol extracts. Applicant further claims an insecticide according to claim 11, wherein the crude extract from *Paeonia suffruticosa*, *Cnidium officinale*, *Cinnamomum cassia* is methanol extract.

Park teaches an insecticide comprising a methanol extract of the bark of *Cinnamomum cassia*, which is used as an agent against the oak nut weevil, *Mechoris ursulus* Roelofs. See page

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2529. Column 2, under "RESULTS: Identification". Park further teaches purification of the methanolic extract with hexane to isolate *trans*-cinnamaldehyde, as a biologically active constituent of the extract.

On page 338, Column 1, under "4.4 Resveratrol and its derivatives", Dinan teaches a methanol extract of *Paeonia suffruticosa* having ecdysteroid antagonistic activity in insects. Although Dinan does not expressly teach his methanol extract of *Paeonia suffruticosa* as an insecticide, the same plant and the same solvent used in the making of the extract taught by Dinan are one and the same, as disclosed by Applicant. Thus, an insecticide is inherent to the methanol extract of *Paeonia suffruticosa* taught by Dinan. It is noted that the reference does not necessarily teach that the composition can be used in the manner instantly claimed (since Dinan does suggest the use of the referenced compounds as pest control agents, on page 338, under "5 CONCLUSIONS AND PROSPECTS"). However, the intended use of the claimed composition does not patentably distinguish the composition, per se, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting.

Applicant is asked to review *In re Hack*, 245 F.2d 246, 248, 114 USPQ 161, 163 (CCPA 1957).

"When the claim recites using an old composition or structure and the "use" is directed to a result or property of that composition or structure, then the claim is anticipated" (MPEP 2100 pp.

2113).

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The references anticipate the claimed subject matter.

Claims 1, 2, 11 and 12 are rejected under 35 U.S.C. 102(b) as being anticipated by Ishii et al. (UI).

Applicant's claimed invention was set forth above.

Ishii teaches a methanol extract of *Cnidium officinale*. Although Ishii does not teach the methanol extract of *Cnidium officinale* as an insecticide, the extract taught by Ishii comprises the same plant source and the same solvent used in the making of the claim-designated plant extract as disclosed by Applicant. Thus, an insecticide comprising the methanolic extract of *Cnidium officinale* taught by Ishii is inherent to the composition taught by Ishii. It is noted that the reference does not teach that the composition can be used in the manner instantly claimed, however, the intended use of the claimed composition does not patentably distinguish the composition, per se, since such undisclosed use is inherent in the reference composition. In order to be limiting, the intended use must create a structural difference between the claimed composition and the prior art composition. In the instant case, the intended use does not create a structural difference, thus the intended use is not limiting. Applicant is asked to review *In re Hack*, 245 F.2d 246, 248, 114 USPQ 161, 163 (CCPA 1957). "When the claim recites using an old composition or structure and the "use" is directed to a result or property of that composition or structure, then the claim is anticipated" (MPEP 2100 pp. 2113).

The reference anticipates the claimed subject matter.

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Claims 1 and 11 are rejected under 35 U.S.C. 102(a) as being anticipated by Gao et al.

(T).

Applicant's claimed invention was set forth above.

Gao teaches an extract of *Paeonia suffruticosa*, and a method of making thereof, wherein the waste residues from the process of making may be used as an insecticide.

- The reference anticipates the claimed subject matter.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michele Flood whose telephone number is (703) 308-9432. The examiner can normally be reached on Monday through Friday from 7:15 am to 3:45 pm. Any inquiry of a general nature or relating to the status of this application should be directed to the Group 1600 receptionist whose telephone number is (703) 308-0196 or the Supervisory Patent Examiner, Brenda Brumback whose telephone number is (703) 306-3220.


MICHELE FLOOD
PATENT EXAMINER

MCF

August 20, 2003